Members of the jury, you have seen and heard all of the evidence and the arguments of the attorneys. Now I will instruct you on the law that applies to this case.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in this case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

You must perform your duties fairly and impartially. In deciding your verdict, you must not allow sympathy, bias, prejudice, fear, or public opinion to influence you. You should not be influenced by any person's race, color, religion, national ancestry, or sex. The parties to this case and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law that I give you, and reach a just verdict regardless of the consequences.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be. It is not my function to determine the facts in this case. That function belongs to you.

You should consider and decide this case as an action between persons of equal standing in the community, and holding the same or similar stations in life. Each party is entitled to the same fair consideration. A corporation is entitled to the same fair consideration as a private individual. All persons and corporations stand equal before the law and are to be dealt with as equals in a court of justice.

As I stated earlier, it is your duty to determine the facts. In determining the facts, you must consider only the evidence that I have admitted in the case. The evidence consists of the testimony of the witnesses, testimony that was read to you from depositions, the exhibits admitted in evidence, and stipulations.

A stipulation is an agreement between both sides that certain facts are true or that a person would have given certain testimony.

Certain things are not evidence. I will list them for you.

First, testimony and exhibits that I struck from the record, or that I told you to disregard, are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded. This includes any press, radio, television, or Internet reports that you may have seen or heard. Such reports are not evidence, and your verdict must not be influenced in any way by such publicity.

Third, questions and objections by the lawyers are not evidence. Attorneys have a duty to object when they believe a question is improper. You should not be influenced by any objection or by my ruling on it.

Fourth, the lawyers' statements and arguments to you are not evidence. The purposes of these statements and arguments is to discuss the issues and the evidence. If the evidence as you remember it is different from what the lawyers said, your memory is what counts.

Some of you may have heard the phrases "direct evidence" and "circumstantial evidence." Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence, in other words it is proof of one or more facts that point to the existence or non-existence of another fact. You are to consider both direct and circumstantial evidence. The law allows you to give equal weight to both types of evidence, but it is up to you to decide how much weight to give to any evidence in the case.

You are to consider all of the evidence in determining your verdict. However, that does not mean that you must accept all of the evidence as true or accurate.

You should use common sense in considering the evidence, and you should consider the evidence in light of your own observations in life.

In our lives, we sometimes look at one fact and conclude from that fact that another fact exists. In law we call this an "inference." You are allowed to make reasonable inferences. Any inferences that you make must be reasonable and must be based on the evidence in the case.

In determining the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. You will also have to decide what weight, if any, to give to the testimony of each witness.

In considering the testimony of any witness, you may take into account:

- the opportunity and ability of the witness to see or hear or know the things that the witness testified about;

- the witness's age;

- the witness's memory;

- the witness's intelligence;

- any interest the witness may have in the outcome of the case, and any bias or prejudice the witness may have;

- the witness's manner while testifying;

- the reasonableness of the witness's testimony in light of all the evidence in the case; and

- any other factors that bear on believability.

The weight of the evidence as to a particular fact does not necessarily depend on the number of witnesses who testify. You may find the testimony of a smaller number of witnesses to be more persuasive than that of a greater number.

A witness may be discredited or "impeached" by contradictory evidence, by, among other things, a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something that is inconsistent with the witness's testimony.

If you believe that any witness has been impeached, then you must determine whether to believe the witness's testimony in whole, in part, or not at all, and how much weight to give to that testimony.

It is proper for an attorney to interview a witness for the purpose of learning what testimony the witness will give. The fact that the witness has talked to an attorney does not, by itself, reflect negatively on the truth of the witness's testimony.

You have heard a witness give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

During the trial, certain testimony was presented to you by the reading of a deposition. Deposition testimony is entitled to the same consideration as testimony that was given in court. You are to judge its truthfulness and accuracy, and you are to weigh and consider it, insofar as possible, in the same way as if the witness had been present and testified from the witness stand.

In a civil lawsuit like this one, the burden is the plaintiff to prove each and every essential element of his claim by a "preponderance of the evidence."

A preponderance of the evidence simply means evidence that persuades you that the plaintiff's claim is more likely true than not true.

In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

If the proof establishes each essential element of the plaintiff's claim by a preponderance of the evidence, then you should find for the plaintiff as to the claim.

If the proof fails to establish any essential element of the plaintiff's claim by a preponderance of the evidence as to the defendant, then you should find for the defendant as to that claim.

The Americans with Disabilities Act ("ADA"), The Statute Under Which Plaintiff David Luttrell Brings His Claim

Plaintiff Luttrell has brought this lawsuit under a federal law known as the Americans with Disabilities Act, which is often referred to by its initials, "ADA." In these jury instructions, I will from time to time refer to the Americans with Disabilities Act as the ADA. The ADA provides, in part, that an employer may not discriminate against an employee with a disability in regard to the terms, conditions, and privileges of employment because of the employee's disability.

Mr. Luttrell's Claim

In this case, plaintiff Luttrell claims that he is disabled under the ADA, and that he was subjected to harassment at his place of employment with defendant Certified based upon his disability that was sufficiently severe or pervasive to create a hostile working environment. Plaintiff Luttrell claims that his employer defendant Certified knew or should have known of the harassment but failed to take prompt and appropriate corrective action to end the harassment. Defendant Certified denies that plaintiff Luttrell is disabled. Defendant Certified also denies that plaintiff Luttrell was subjected to a hostile working environment, and defendant Certified denies that it is liable to plaintiff Luttrell under the ADA, because defendant Certified contends that after it first knew of co-worker harassment it took appropriate corrective action to prevent future harassment.

Elements of Plaintiff David Luttrell's Claim of Hostile Environment Disability Harassment

In order for plaintiff David Luttrell to establish his claim that defendant Certified is liable for co-worker hostile environment disability harassment, plaintiff Luttrell must prove each of the following elements by a preponderance of the evidence:

First, that plaintiff Luttrell is disabled as that term is used by the ADA;

Second, that plaintiff Luttrell was subjected to harassing conduct committed by other persons employed at defendant Certified because of his disability;

Third, that plaintiff Luttrell personally found the alleged harassing conduct to be unwelcome and that the alleged harassing conduct caused him to believe his working environment was so abusive or hostile that it altered the terms and conditions of his employment;

Fourth, that a reasonable person would find the alleged harassing conduct so severe or pervasive that it objectively created an abusive or hostile working environment and altered the terms and conditions of employment; and

Fifth, that defendant Certified failed to take prompt and appropriate corrective actions to end the alleged harassing conduct after it knew or should have known of the alleged harassing conduct.

If you find that plaintiff Luttrell has proven each of these elements by a preponderance of the evidence, then you must find for plaintiff Luttrell as to defendant Certified's liability on plaintiff Luttrell's ADA claim.

If, on the other hand, you find that plaintiff Luttrell has failed to prove any of these elements by a preponderance of the evidence, then you must find for defendant Certified as to its liability on plaintiff Luttrell's ADA claim.

First Element: "Disabled" as that term is used by the Americans with Disabilities Act ("ADA")

All physical impairments are not covered by the ADA because not all individuals who are impaired are legally disabled under the ADA. To show that he is disabled under the ADA, plaintiff Luttrell must establish at least one of the following by a preponderance of the evidence:

1. That his physical impairment substantially limits one or more of his major life activities; or
2. That he has a record of his impairment substantially limiting one or more of his major life activities; or
3. That his physical impairment is regarded as substantially limiting one or more of his major life activities.

If plaintiff Luttrell proves any one or more of these by a preponderance of the evidence, then he is legally disabled under the ADA. If plaintiff Luttrell does not prove at least one of these by a preponderance of the evidence, then he is not legally disabled under the ADA. Your determination of whether plaintiff Luttrell was disabled should be made as of the time of the alleged disability harassment. Additionally, you must consider plaintiff Luttrell's ability, if any, to compensate for his physical impairment in determining whether or not he is substantially limited in a major life activity.

"Major life activities" means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing and learning.

Plaintiff Luttrell is "substantially limited" within the meaning of the ADA if, because of his physical impairment, he is either unable to perform a major life activity that the average person in the general population can perform, or, he is significantly restricted as to the condition, manner, or duration under which he can perform a particular major life activity as compared to the condition,

manner, or duration under which the average person in the general population can perform that same activity. In determining whether plaintiff Luttrell's impairment substantially limits his ability to perform a major life activity, you should consider:

1. The nature and severity of his impairment;

2. The duration or expected duration of his impairment; and

3. The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from his impairment.

To have a "record of disability," plaintiff Luttrell must be able to show that, because of his physical impairment, he has a history of, or has been misclassified as, being substantially limited in one or more major life activities.

To be "regarded as disabled," plaintiff Luttrell must show either that Certified treats his physical impairment as if it substantially limited one or more of his major life activities, even if his impairment does not actually limit a major life activity, or that his physical impairment substantially limits one or more major life activity only as a result of the attitudes of others toward his impairment.

Second Element: Disability Harassment

To show that he was harassed because of his disability, plaintiff Luttrell must show that the harassment or offensive behavior was directed at his disability. The ADA does not prohibit all verbal or physical harassment in the workplace; it only prohibits harassment based upon disability.

Third Element: Subjective Finding of Abusive or Hostile Working Environment

As to the third element of his claim, plaintiff Luttrell must prove that he did not welcome the harassing conduct and that he believed the harassing conduct was so severe or pervasive that it altered the terms and conditions of his employment and created an abusive or hostile working environment.

Fourth Element: Objective Finding of Abusive or Hostile Working Environment

To show that the alleged harassment at his work environment rose to the level of being prohibited by the ADA, plaintiff Luttrell must prove by a preponderance of the evidence that it was so severe or pervasive that a reasonable person would believe that the conduct altered the terms and conditions of his employment and created a hostile or abusive working environment. The ADA does not create a civility code, and it does not prohibit all unpleasant or boorish behavior. In deciding whether a reasonable person would consider the harassment plaintiff Luttrell experienced to be sufficiently severe or pervasive that it rose to a violation of the ADA, you, the jury, should consider all the circumstances, including the frequency of the harassing conduct directed at plaintiff Luttrell's disability; its severity; whether it was physically threatening or humiliating or mere offensive utterances; and whether it unreasonably interfered with Luttrell's work performance.

Fifth Element: An Employer's Liability under the ADA for Co-worker Harassment

As to the fifth element, plaintiff Luttrell must prove that defendant Certified is liable for the alleged disability harassment. In cases like this, where the harassment is committed by co-workers, an employer is liable for the harassment when it either knows or should know of the harassment and fails to take prompt and appropriate corrective action. In this case, defendant Certified admits that it first knew of the alleged co-worker harassment of plaintiff Luttrell on January 29, 2002. Therefore, you, the jury, must decide whether plaintiff Luttrell has proved that Certified knew or should have known of the alleged co-worker harassment before January 29, 2002.

After deciding when defendant Certified knew or should have known of the alleged harassment, you, the jury, must consider whether defendant Certified took prompt, meaning within a reasonable time, and appropriate corrective action after it first knew or should have known of the alleged harassment. If defendant Certified took prompt and appropriate action after it first knew or should have known of the alleged harassment, then defendant Certified cannot be held liable for the alleged harassment. If defendant Certified did not take prompt and appropriate action after it first knew or should have known of the alleged harassment, then it should be held liable for the alleged harassment.

To determine when defendant Certified knew, or reasonably should have known, of the alleged harassing conduct, you, the jury, must consider whether defendant Certified had knowledge of such facts, or whether circumstances existed, as would reasonably make it aware of the claimed harassment. Employers cannot be expected to know of every impropriety committed by lower-level employees. General complaints about the workplace or complaints about matters other than harassment are not sufficient to put an employer on notice of harassment. If an employer designates

a person to receive complaints of harassment, this person becomes the natural channel for the making and forwarding of employee complaints. An employee can reasonably be expected to utilize this channel in normal circumstances, and this person becomes the channel through which the employer receives knowledge of harassment. If no person is designated by an employer to receive complaints, or the person designated is not easily accessible, an employer may receive knowledge of harassment when a manager or supervisor or someone the employee reasonably believed was authorized to receive a complaint receives notice of the harassment.

To determine whether defendant Certified took prompt action, you should consider whether the action defendant Certified took was done within a reasonable time of when it knew or should have known of the alleged harassment.

To determine whether defendant Certified took appropriate corrective action in response to a complaint, you should consider the acts defendant Certified took, including any investigation, discipline, or other action to remedy the harassment. For the action to be appropriate, it need not be successful in terminating the harassment or in preventing future harassment, but it does need to be reasonably likely to terminate the harassment or reasonably likely to prevent future harassment.

Corporate Responsibility

Defendant Certified is a corporation. A corporation can act only through its agents or employees who are authorized, or reasonably appear to be authorized, to act on behalf of the corporation. An agent or employee of a corporation may bind the corporation by acts and statements made only while acting within the scope of the authority delegated to the agent by the corporation, or within the scope of the employment duties assigned, or reasonably believed to be assigned, to the employee by the terms of employment with the corporation or under the law.

What this means in this case is that acts of alleged harassment by lower-level employees at defendant Certified, such as Jason Soltis or other lower-level employees, cannot by themselves bind defendant Certified or render defendant Certified liable for the alleged disability harassment of plaintiff Luttrell. As stated earlier, what must also be proven by a preponderance of the evidence is that the alleged co-worker disability harassment of plaintiff Luttrell was not acted upon with reasonable promptness after it came to the attention of, or should have come to the attention of, a management person at defendant Certified who either:

(1) had the authority at defendant Certified to do something about harassment, or

(2) had the duty under the terms of his or her employment at defendant Certified, or was reasonably believed to have the duty, or was reasonably charged by law with having the duty, to pass information of alleged harassing conduct to a person at defendant Certified who had the authority to do something about it.

After defendant Certified becomes aware of co-worker harassment, it is charged with the responsibility of taking appropriate corrective action.

Cautionary Instruction on Damages

I must now instruct you on damages. You should not interpret the fact that I am giving instructions about damages as an indication in any way that I believe that plaintiff Luttrell is entitled to damages.

It is your task first to decide whether defendant Certified is liable on plaintiff Luttrell's claim. I am instructing you on damages only so that you will have guidance in the event you decide that defendant Certified is liable and that plaintiff Luttrell is entitled to recover money from defendant Certified on his claim.

Actual Damages

If you find in favor of plaintiff David Luttrell and against the defendant Certified as to each of the elements of plaintiff's claim, then you should award plaintiff Luttrell such sum as you find by the preponderance of the evidence will fairly and justly compensate plaintiff Luttrell for any damages you find he sustained as a direct result of the disability harassment hostile environment for which you have found defendant Certified liable. These are called actual damages. Plaintiff Luttrell's claim for actual damages includes distinct types of damages, and you must consider them separately.

First, you must determine the amount of any wages plaintiff Luttrell would have earned in his employment with defendant Certified if he had not been subjected to disability harassment hostile environment.

Second, you must determine the amount of any other damages sustained by plaintiff Luttrell, such as medical costs and mental health costs he incurred as a direct result of disability harassment hostile environment.

Compensatory Damages

In addition to actual damages on which I have instructed you, if you find in favor of plaintiff David Luttrell, then you should award plaintiff David Luttrell such sum as you find by the preponderance of the evidence will fairly and justly compensate plaintiff Luttrell for his emotional distress, pain, suffering, inconvenience, humiliation, and loss of enjoyment of life. These damages are called compensatory damages.

If you decide to award compensatory damages, you should be guided by dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. In order to be recoverable, damages must be actual, and neither speculative, remote, nor uncertain. On the other hand, mere difficulty in ascertaining the amount of damages is not fatal.

The law does not require that a plaintiff prove the amount of damages with mathematical precision, but only with as much definiteness as circumstances permit.

Upon retiring to the jury room, select one of your number as your foreperson. The foreperson will preside over your deliberations and will be your representative here in court.

Forms of verdict have been prepared for you.

These forms will be brought to you in the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the appropriate form, and each of you will sign it.

During the trial, some of you from time to time have made notes. Please remember in using your notes during your deliberations that your notes are not evidence. Your notes are merely an aid to you in remembering the evidence. You should not be unduly influenced by the notes of other jurors. A juror's notes are not entitled to any weight if the notes are inconsistent with the collective recollections of the members of the jury as to the evidence in the case. You as the jury should rely on your collective recollections of the evidence in reaching your verdict in this case.

I do not anticipate that you will need to communicate with me. If you do, however, the only proper way is in writing, signed by the foreperson, or if he or she is unwilling to do so, by some other juror, and given to the court security officer. I will photocopy your communication, give it to counsel, and allow counsel to meet with me here in open court, as required by the law, before I respond to your communication.

If any communication is made, it should not indicate your numerical division.

The verdict must represent the considered judgment of each juror. Your verdict must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the views of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to re-examine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions or your fellow jurors or solely for the purpose of returning a unanimous verdict.

All of you should give fair consideration to all the evidence and deliberate with the goal of reaching a verdict which is consistent with the individual judgment of each juror. You are impartial judges of the facts. Your sole interest is to determine the truth from the evidence in the case.